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IN THE

Supreme Court of the United States

October Term, 1968

No. 379

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, INTERNATIONAL TERMINAL OPERATING CO., INC., prays that a writ of certiorari issue to review (a) the judgment of the United States Court of Appeals for the Second Circuit, entered on April 12, 1968, which reversed the judgment of the United States District Court for the Southern District of New York, entered on May 3, 1967, in accordance with a jury verdict dismissing the Respondent's action for indemnity against Petitioner, and (b) the orders of the said Court of Appeals, entered on May 13, 1968, denying application for rehearing and rehearing *in banc*.*

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* The judgment, obtained by the initial plaintiff, ANTHONY ALBANESE, against N. V. NEDERL. AMERIK STOOMV. MAATS. which,

Citations to Opinions Below

The first trial of the personal injury action brought by ANTHONY ALBANESE against N. V. NEDERL. AMERIK STOOMV. MAATS (hereinafter referred to as HOLLAND AMERICA LINE) in which action your Petitioner, INTERNATIONAL TERMINAL OPERATING CO., INC. (hereinafter referred to as I.T.O.), had been impleaded and from whom indemnity had been sought, resulted in a judgment, based upon a jury verdict, in favor of ALBANESE against HOLLAND AMERICA LINE in the sum of $145,000 and dismissing the indemnity action by HOLLAND AMERICA LINE against I.T.O. Said original judgment of the District Court is printed in Petitioner's separate Appendix hereto (p. 1a).

On appeal by HOLLAND AMERICA LINE to the United States Court of Appeals for the Second Circuit, the aforesaid judgment was reversed both insofar as (a) it granted ALBANESE a recovery and (b) it dismissed the indemnity action against I.T.O., and the entire case was remanded for a new trial. The opinion of the Court of Appeals is reported officially at 346 F.2d 481, and is printed in the Appendix hereto (p. 2a).

ALBANESE, HOLLAND AMERICA LINE and I.T.O. all petitioned this Court for the issuance of writs of certiorari. In a *Per Curiam* opinion, reported at 382 U.S. 283, this Court accepted certiorari and reversed the Court of Appeals judgment as to ALBANESE and as to him reinstated the judgment of the District Court. However, it denied the petitions for certiorari by I.T.O. and HOLLAND AMERICA

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with interest totalled $160,497.33, was satisfied by N. V. Nederl. Amerik Stoomv. Matts on February 9, 1966, and Albanese has been, and is, no party to this indemnity action by N. V. NEDERL. AMERIK STOOMV. MAATS against INTERNATIONAL TERMINAL OPERATING CO., INC.

LINE. Rehearing on the denial of I.T.O.'s petition for certiorari was denied at 382 U.S. 1030 and I.T.O.'s motion for leave to file a second petition for a rehearing was denied at 384 U.S. 994.

HOLLAND AMERICA LINE thereafter moved in the Court of Appeals for judgment against I.T.O. as a matter of law. That motion was denied by order of the Court of Appeals entered on March 1, 1966.

HOLLAND AMERICA LINE then moved for summary judgment in the District Court. The memorandum decision of District Judge Tyler, dated October 1, 1966, denying HOLLAND AMERICA LINE'S motion for summary judgment is unreported, and is printed in the Appendix hereto (p. 8a).

A second trial on the indemnity claim by HOLLAND AMERICA LINE against I.T.O. began before District Judge Levet and a jury on April 16, 1967. The jury answered special interrogatories and delivered a general verdict in favor of I.T.O. (Appendix p. 9a). A judgment, based upon said jury's verdict, dismissed the claim of HOLLAND AMERICA LINE against I.T.O. and said judgment was entered in the District Court on May 3, 1967 (Appendix p. 11a).

Thereafter, post trial motions by HOLLAND AMERICA LINE for judgment *non obstante veredicto* and for a new trial were denied by District Judge Levet in an opinion which is printed in the Appendix (p. 12a), and is reported at 279 F. Supp. 635.

The judgment of the District Court was reversed by a 2-1 decision of the Court of Appeals, and both the majority and dissenting opinions are printed in the Appendix (p. 28a) and are reported at 392 F.2d 763.

A petition by I.T.O. for rehearing and rehearing *in banc* was denied by order of the Court of Appeals on May 13, 1968, Appendix (pp. 35a-36a).

Jurisdiction

The judgment of the Court of Appeals was entered on April 12, 1968, Appendix (p. 37a) and a petition for rehearing and rehearing *in banc* was denied by orders entered on May 13, 1968, Appendix (pp. 35a-36a).

This petition for the issuance of a writ of certiorari is being filed within ninety (90) days after the aforesaid denial of the petition for rehearing and rehearing *in banc* on May 13, 1968.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The Questions Presented

Where a jury specifically found in a shipowner's indemnity action against a stevedore (a) that the stevedore continued working only because expressly ordered to do so by the shipowner, and (b) that in so continuing to work the stevedore reasonably relied upon the shipowner's promise to take protective measures against a developing danger, and where the jury returned answers to special interrogatories and a general verdict in favor of the stevedore against the shipowner's claim for indemnity:

(1) Was it an "unjustified usurpation of the function of the jury" (as held by the dissenting opinion in the U.S. Court of Appeals) and a deprivation of the stevedore's constitutional right to a jury trial, for the Court of Appeals to reverse and grant the shipowner indemnity as a matter of law?

(2) Was it error for the Court of Appeals to substitute its own judgment for that of the jury on the

question of whether the continuation at work by the stevedore, under the circumstances, was a breach of the stevedore's implied warranty of workmanlike service?

(3) Was it error for the Court of Appeals to substitute its own judgment as a matter of law for that of the jury which had found as a fact, under a proper charge, that the evidence as to the shipowner's conduct precluded it from recovering indemnity?

Constitutional Provision Involved

UNITED STATES CONSTITUTION, AMENDMENT VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law".

Statement of the Case

At its genesis, this was an action to recover damages for personal injuries, brought by a longshoreman, ANTHONY ALBANESE, against the respondent herein, HOLLAND AMERICA LINE. HOLLAND AMERICA LINE impleaded the Petitioner, I.T.O., seeking indemnity for the latter's alleged breach of the implied warranty of workmanlike service which it owed as a stevedoring contractor. Federal jurisdiction was predicated upon 28 U.S.C. §1332 as ALBANESE was a citizen of New Jersey and HOLLAND AMERICA LINE was a corporation of the Netherlands and the amount in issue exceeded $10,000, exclusive of interest and costs.

The salient facts, in concise form, are that on February 25, 1961 the Petitioner was engaged, pursuant to written contract, in loading steel sheets and tinplate into the #2 hold of the M.S. Schiedyk, a vessel owned and operated by the Respondent. Small gasoline powered vehicles, known as hi-los, were used by the longshoremen to help move and manipulate the heavy cargo which was being loaded and stowed. Ventilation was afforded by the hatch and cowl openings, although the vessel was equipped with a Cargocaire ventilating system which had an air moving and changing capacity of 6,000 cubic feet per minute and which could have completely changed all the air in the #2 hold in less than five minutes time.

The undisputed testimony and proof was that the vessel's Cargocaire ventilating system was under the exclusive operation and control of the ship's officers who would pass upon any request by longshoremen to turn on the system. Significantly, pursuant to stipulation made in open Court by counsel for HOLLAND AMERICA LINE, this Cargocaire ventilating system was adequate within the meaning of Section 9.93 of the Safety and Health Regulation for Longshoring so that Petitioner was not required to bring aboard portable blowers.

There was undisputed testimony from both longshoremen and ship's personnel that up until approximately 11:00 A.M. the working conditions in the hold were good. However, at approximately 11:00 A.M. the longshoremen complained to their hatch boss, Curko, a foreman in the employ of I.T.O., about the air in the hatch becoming foul, and they requested that Curko have the vessel's ventilating system turned on. Curko ascended to the main deck of the vessel and told a ship's mate to turn on the ship's blowers or the longshoremen would stop work. The mate assured Curko that he would turn on the ship's

blowers and he directed Curko to continue working in the #2 hatch. It should be noted at this point that the following special interrogatory was answered in the affirmative by the jury:

> "Has the defendant International proved by a fair preponderance of the credible evidence that a mate or an officer of the vessel, MS Schiedyk, on February 25, 1961 at about 11:00 A.M., told Curko, the hatch boss for International, that he would turn on the ship's blower in the #2 hatch and that the said officer or mate at that time told Curko to proceed with the work in #2 hatch?"

Curko descended into the hold and reported to his men that the mate promised to turn on the ship's blower and wanted them to continue working.

In reliance upon that assurance by the mate, and in compliance with his order, the longshoremen did continue working. It is to be further noted that the jury also answered the following special interrogatory in the affirmative:

> "Has the defendant International proved by a fair preponderance of the credible evidence that on February 25, 1961 International reasonably relied on this promise in proceeding to continue to work in the hold?"

However, after continuing at work for approximately six or seven minutes, Curko realized that the blowers had not been turned on and he again climbed out of the hold to find the mate and ascertain what was happening. He could not find the mate, so he went back to his men and ordered them to stop work and to come up out of the hatch. One of the longshoremen, Anthony Albanese, fell while ascending the ladder to come out of the hatch at that time,

and was found to be suffering from carbon monoxide inhalation. There was no proof, or even a claim, by HOLLAND AMERICA LINE that the hi-los used were in any way defective or giving off excessive fumes.

Nor was there any proof whatever by HOLLAND AMERICA LINE that the atmosphere in the hatch had become unsafe or dangerous prior to 11:00 A.M. when the longshoremen working therein first began to complain.

The basic argument, advanced by HOLLAND AMERICA LINE at the trial, was that in complying with the mate's orders and continuing to work in reliance on the mate's assurance that he would turn on the ship's blowers, I.T.O. breached its implied warranty of workmanlike service.

The jury rejected that contention of HOLLAND AMERICA LINE and, as explained at length by District Judge Levet in his opinion, 279 F. Supp. 635, 637-639, Appendix (p. 12a), determined (a) that there was no breach of warranty by I.T.O., and (b) that in any event the conduct of HOLLAND AMERICA LINE was such as to preclude indemnity even if there were a breach of warranty. The jury's verdict in favor of I.T.O. was incorporated in a judgment which on appeal was reversed by a 2-1 decision of the Court of Appeals which granted HOLLAND AMERICA LINE full indemnity from I.T.O. as a matter of law.

The majority opinion of this divided Court of Appeals quite clearly reexamined the facts, already determined by the jury, and came to a different conclusion. With respect to whether or not I.T.O. had breached its implied warranty of workmanlike service, the Court of Appeals stated, 392 F.2d 763, 765:

> "As we said on the first appeal, when the ship's blowers were not turned on, the stevedore could either have

> stopped work or used its own blowers. It did neither and plainly breached its warranty of workmanlike service".

This is most obviously a factual determination, contrary to that of the jury, which had determined that I.T.O.'s continuation at work for six or seven minutes pursuant to the order of the vessel's mate and in reasonable reliance upon the mate's assurance that he would turn on the ship's blowers did not constitute a breach of warranty.

Respecting the question of whether the conduct of HOLLAND AMERICA LINE's mate (in directing the longshoremen to continue at work, in assuring the longshoremen that he would turn on the ship's blowers, and in failing to turn on the ship's blowers) constituted conduct sufficient to preclude indemnity (which the jury found that it did), the majority opinion of the Court of Appeals held that this conduct was inadequate to preclude indemnity.

The past history of this litigation must also be alluded to as it demonstrates how the action of the Court of Appeals is in conflict with that same Court's prior determination in this very case.

The first trial of this action, containing substantially the same proof as the retrial, resulted in a jury verdict awarding ALBANESE $145,000 against HOLLAND AMERICA LINE and dismissing HOLLAND AMERICA LINE's claim for indemnity against I.T.O. On appeal, 346 F.2d 481, the Court of Appeals reversed both the recovery obtained by ALBANESE and the dismissal of HOLLAND AMERICA LINE's indemnity action, and it remanded the entire matter for a new trial. That reversal of both parts of the case was prompted by errors which the Court of Appeals found in the Trial Court's charge to the jury. However, in remanding the indemnity action for a new trial, the Court of

Appeals rejected HOLLAND AMERICA LINE's contention that it was entitled to indemnity as a matter of law, and held that there were triable issues of fact.

After the judgment in favor of ALBANESE was reinstated by this Court, 382 U.S. 283, and was subsequently satisfied by HOLLAND AMERICA LINE, HOLLAND AMERICA LINE moved in the Court of Appeals for judgment against I.T.O. as a matter of law. That motion was denied by order, without opinion, of the Court of Appeals of March 1, 1966. This was thus a second holding by the Court of Appeals that the indemnity claim contained triable issues of fact. In now reversing a second jury verdict in favor of I.T.O. and in granting HOLLAND AMERICA LINE indemnity as a matter of law, the Court of Appeals acted contrary to its own prior decisions herein and in re-examining the facts and determining the issues as a matter of law performed an "unjustified usurpation of the function of the jury", as cogently stated in the dissenting opinion of Circuit Judge Moore.

REASONS FOR GRANTING THE WRIT

I.

In reversing the judgment of the District Court, the United States Court of Appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings as to require exercise by this Court of its general power of supervision, not only to halt judicial encroachment upon the Constitutionally guaranteed right of trial by jury, but also to preserve the integrity of this Court's decisions in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438 and *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines Ltd.*, 369 U.S. 355, 82 S.Ct. 780.

The majority decision of the Court of Appeals in the instant case, reversing the unanimous verdict of impartial jurors, was an arbitrary and unreasonable action, directly contrary not only to the provisions of the Seventh Amendment to the Constitution of the United States, but also directly contrary to the accepted and usual course of judicial proceedings. Indeed, it was contrary to the earlier determination of this matter made by the same Judge who wrote for the majority in both instances, Circuit Judge Smith. The action, taken by the Court of Appeals, was most aptly described in the dissenting opinion of Circuit Judge Moore as "an unjustified usurpation of the function of the jury." By violating the petitioner's constitutionally guaranteed right to a jury trial, the Court of Appeals has taken another step in the gradual process which seems to have the goal of making stevedoring contractors into second-class citizens, juridically speaking. The plight of the stevedore-contractor has been graphically and realis-

tically painted. See dissenting opinion of Brown, *J.*, in *Strachan Shipping Company* v. *Melvin*, 327 F.2d 83, and concurring opinion in *McClendon* v. *Charante Steamship Company*, 348 F.2d 298.

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.*" (Emphasis added).

The primary purpose of such amendment is the preservation of the "common law distinction between the province of the Court and that of the jury, whereby, in the absence of express or implied consent, issues of law are resolved by the Court and issues of fact are resolved by the jury under appropriate instructions of the Court", *Baltimore and C. Line* v. *Redman*, 295 U.S. 654, 657 (1935); *Walker* v. *New Mexico & S. P. R. Co.*, 165 U.S. 593, 596 (1897); and *Dimick* v. *Scheidt*, 293 U.S. 474, 476, 485-86 (1935).

There can be no doubt but that the questions of whether a stevedore has breached its implied warranty of workmanlike service and whether a shipowner's conduct is such as would in any event preclude indemnity are issues of fact. For in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 567, 78 S.Ct. 438, 441, where the facts were that the stevedore contractor built the unsafe winch shelter and used the same for five days although it was obviously unsafe, this Court stated:

> "If in that regard respondent (Stevedore) rendered a substandard performance which lead to foreseeable

> liability of petitioner (shipowner), the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery. The evidence bearing on these issues*—petitioner's action in making the shelter on its ship available to respondent's employees in Boston although it apparently was unsafe, as well as respondent's continued use of the shelter for five days thereafter without inspection—*was for jury consideration under appropriate instructions*". (Emphasis added).

Indeed, the arbitrary and capricious nature of the action taken by the Court of Appeals is heightened by the fact that it had already previously held on the appeal following the first trial of this action that the indemnity claim contained factual issues. In appealing from the first adverse jury verdict against it HOLLAND AMERICA LINE claimed that it was entitled to judgment as a matter of law. Alternatively, it asked for a new trial. In reversing and remanding an indemnity action for a new trial on the basis of what it thought to be an error in the charge, the Court of Appeals (per opinion of Circuit Judge Smith) rejected the argument that indemnity was required as a matter of law and agreed that factual issues were presented. In the course of its opinion 346 F. 2nd 481, 484, the Court said:

> "The jury *could* certainly find that the stevedore did not fulfill his duty of workmanlike service * * *" (Emphasis added)

Quite obviously this language is permissive rather than mandatory and, coupled with its action in rejecting HOLLAND AMERICA LINE's argument that it was entitled to indemnity as a matter of law, is proof that the Court of Appeals (per Circuit Judge Smith) was aware that the in-

demnity action presented triable issues of fact. *Why remand a case for a new trial on the basis of an error in the charge if as a matter of law no issue of fact is involved? Why subject the parties to an expensive exercise in futility in retrying before a jury issues which are not for jury determination?*

In the light of that background, the latest reversal by the Court of Appeals, 392 F.2d 763 (again per Circuit Judge Smith), of a second jury verdict, adverse to HOLLAND AMERICA LINE, and its mandate that HOLLAND AMERICA LINE was entitled to judgment as a matter of law was clearly a violation not only of petitioner's constitutionally protected rights, *but a violation of what this very Court of Appeals knew to be petitioner's constitutionally protected right.*

Now, what rules of the common law does the Seventh Amendment of the Constitution refer to for the reexamination of a jury tried fact.

The only means, known to the common law, to reexamine such facts which are properly tried by the jury are the granting of a new trial by the Court where the issu was tried or the award by an Appellate Court of a *venire facias de novo* for some error of law in the proceedings. *Parsons* v. *Bedford,* 3 Pet. 447, 7 L.Ed. 732. Even the enactment of Rule 50(b) of the Federal Rules of Civil Procedure did not change the sharp delineation between the function of the jury or the function of a Court. Rule 50(b) added nothing of substance to the rights of litigants as they existed theretofore, *Montgomery Ward* v. *Duncan,* 311 U.S. 250. As stated by this Court in *Berry* v. *United States,* 312 U.S. 450, 453:

> "But that rule (Rule 50) has not taken away from juries and given to judges any part of the exclusive power of

> juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law".

A necessary corollary to the Seventh Amendment is that not even an appellate court may substitute its judgment for that of the jury, *Dennis* v. *Denver & Rio Grand Western Railroad Co.*, 375 U.S. 208. Where the evidence is susceptible of different conclusions by reasonable men, the issue must be resolved by the jury, *Scheimann* v. *Grace Line Inc.*, 267 F.2d 596. The function of an Appellate Court vis-a-vis a jury verdict has been well articulated by this Court in *Lavender* v. *Kurn*, 327 U.S. 645 and more recently in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 110, wherein the following was quoted with approval from *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable".

Thus, in dealing with the issue of whether the stevedoring services were performed in a workmanlike manner under circumstances where the stevedore, alerted to a potential danger, continued working for six or seven minutes only because it was expressly directed to so continue by the shipowner who also gave assurances that immediate protective and corrective action were being taken, the jury determined as a question of fact that under the *totality of circumstances* it was a workmanlike performance. It was not for the Court of Appeals to substitute its own contrary judgment. Similarly, whether the giving of those

orders and assurances by the shipowner precluded it from recovering indemnity from a stevedore whose fault lay in reasonably relying on the same was also a matter for determination by the jury. Again, it was not for the Court of Appeals to substitute its own judgment for that of the jury.

One would think that the almost on all fours determination by this Court in *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines,* 369 U.S. 355, 82 S.Ct. 780 would have been dispositive of the appeal to the Court of Appeals and have required an affirmance. There, in dealing with a Shipowner's claim for indemnity against a Stevedore, this Court reversed the Court of Appeals, reinstated the judgment of the District Court in accordance with the jury's verdict, and said (p. 358 of 369 U.S., p. 783 of 82 S.Ct.):

> "We might agree with the Court of Appeals had the questions of fact been left to us. But *neither we nor the Court of Appeals can redetermine facts found by the jury* any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law'". (Emphasis added)

This Court further stated (p. 364 of 369 U.S. and p. 786 of 82 S.Ct.:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment" (Citing cases).

Thus, by ignoring well established law which delineates the different functional spheres of a Court and a jury, by its refusal to accept this Court's determinations and decisions that the issues here involved are factual ones for resolution by a jury, by refusing to pay attention to its own earlier determination in this very case that the indemnity issues herein were factual ones to be determined by a jury, and by depriving petitioner of its constitutionally guaranteed right to trial by jury, the Court of Appeals has so far departed from accepted and usual judicial proceedings that this Court should exercise its power of supervision in order to preserve the concept of the rule of law.

II.

The majority decision of the United States Court of Appeals for the Second Circuit is in direct conflict not only with decisions of this Court, but with decisions of the United States Courts of Appeals for the First, Third, Fourth, Fifth and Ninth Circuits; and it is even in conflict with other decisions of the Second Circuit, including a prior decision of that Circuit in this very case.

A. The conflict with this Court.

The conflict between the decision appealed from and the holdings and principles enunciated by this Court is discussed at pages 12-16, *supra,* and no point would be served in repeating the same at length. Suffice it to say that in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.,* 355 U.S. 563, this Court declared that the questions of whether a Stevedore breached its warranty of workmanlike service and whether a Shipowner's conduct precludes indemnity, are questions *of fact.* The U.S. Court of Appeals

has determined the same in the case at bar to be issues of law.

Further, whereas in *Atlantic and Gulf Stevedores Inc.* v. *Ellerman Lines Ltd.,* 369 U.S. 355, 82 S.Ct. 780, this Court repeated that these are issues of fact on which a Court is not permitted to substitute its own judgment for that of the jury, the U.S. Court of Appeals for the Second Circuit has disregarded completely that principle of law.

Preservation of the integrity of these decisions as well as judicial stability should commend the issuance of a writ herein.

B. The conflict with other Circuits.

Distilled to its essence, the majority opinion of the U.S. Court of Appeals holds that a stevedoring contractor is liable to indemnify a shipowner as a matter of law for continuing to work pursuant to express orders to do so from the shipowner and in reasonable reliance upon certain assurances of safety made by the shipowner. Yet, U.S. Courts of Appeals for every other Circuit which have dealt with comparable factual situations have held such issues to be factual and have affirmed jury verdicts in favor of the Stevedore.

Hudson Steamship Company, Ltd. v. *Colon,* 314 F.2d 44, was decided by the Court of Appeals for the *First Circuit.* On at least three occasions before the accident, the Stevedore, finding a winch defective, had called the Shipowner's attention to the fact. On each occasion the Shipowner did some work on the winch, told the Stevedore that it was repaired, and instructed the Stevedore to resume work. Shortly after the last such repair, the accident occurred. The Shipowner there argued, essentially as the Shipowner here argued, that the Stevedore had the last

clear chance and should be liable for indemnity in continuing to work. The Court held that the Shipowner could not be heard to complain that the Stevedore continued to work, because that continuation at work was based upon the Shipowner's instructions. So, too, in the case at bar.

In *Thompson* v. *Trent Maritime Co.*, 353 F.2d 632 and in *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional*, 294 F.2d 32, the U. S. Court of Appeals for the *Third Circuit* had occasion to deal with these issues. As it stated in the *Thompson* case:

> "In our case, one of the longshoremen, Bernard Troutman, who was in No. 3 hold on the day Thompson was injured, testified, without being contradicted, that when the condition of the hold was called to the mate's attention, his response was: 'Just leave it lay there. That is all right.' It has been recognized that indemnity may be denied when the shipowner or those operating the vessel participate in some way in the decision to work in an unseaworthy area of the ship or induces the stevedore to go on with the work."

The uncontradicted proof in the case *sub judice* is that the Shipowner directed the Stevedore to continue work in an unseaworthy area of the ship and induced him to continue with the work by assurance that the blowers would be turned on immediately. Clearly, the decision of the U. S. Court of Appeals in our case is in direct conflict with that of the Third Circuit in the *Thompson* case.

Similarly, in the *Hodgson* case, *supra*, the U. S. Court of Appeals for the *Third Circuit* said:

> "*It was for the jury to determine* whether it was unworkmanlike for the stevedoring company to continue operating the winch, which it knew had been defective, after receiving a categorical assurance from the ship-

owner's crew that it was 'O.K.' The same can be said for the shipowner's argument that the stevedoring company, even before the accident, knew that the winch was defective and that efforts at repair had been unsuccessful. *At most, it can be said that these are questions over which reasonable men could differ, and that, as such, they were properly referred to the jury*". (Emphasis added)

In the *Fourth Circuit, Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co.*, 311 F. 2nd 663, presented a factual situation virtually identical to the one here presented. There, as here, a ship was unseaworthy because of the presence of noxious gas which the contractor employing the injured plaintiff had reported to the ships' officer as soon as it was known. The ship's officer told the contractor's foreman, as here, that it was all right to continue working in the area, and the jury specifically found that the contractor acted with due care in relying on the statement of the ship's officer. It was held that under those circumstances the indemnity issues of whether the contractor performed in a workmanlike manner and whether the shipowner's conduct precluded indemnity were factual ones for the jury. Such holding is in square conflict with the holding of the majority opinion in this case.

The *Fifth Circuit* had an opportunity to pass upon the issue here presented in *Compagnie Anonima* v. *Matthews*, 371 F.2d 971, and in *Waterman Steamship Corporation* v. *David*, 353 F.2d 660. In the *Matthews* case an unseaworthy condition consisted of excess dunnage which cluttered the working area in the hold. That condition became known to the stevedore who requested the vessel's mate to remove the dunnage. The mate insisted the dunnage remain and directed the stevedore to work over it. The Court held that indemnity may and should be denied when the Shipowner

or those operating the vessel learned of the conditions under which work was to be performed and ordered the Stevedore to proceed with work under those conditions. It affirmed a judgment denying the Shipowner indemnity on the grounds that its conduct in directing the Stevedore to continue at work was such as to preclude recovery of indemnity. Again, a square conflict with the majority opinion in the instant case.

In the *Waterman* case, *supra,* the U. S. Court of Appeals for the *Fifth Circuit* held that resolution of the indemnity issues would involve a *weighing process by the fact finder.*

And, in the *Ninth Circuit* is to be found the decision of *United States* v. *Harrison,* 245 F.2d 911, wherein a Shipowner, who directed a Stevedore to continue working, notwithstanding the presence of oil on the floor of the work area, was denied indemnity.

Thus, in every other Circuit wherein the issues here presented have been considered, there have been decisions opposite to and in conflict with that of the majority opinion of the U. S. Court of Appeals for the Second Circuit in the instant case.

It is respectfully submitted that the solitary and markedly different position taken by the Court of Appeals herein from that of all other Courts of Appeals, which considered these issues, warrants attention by this Court.

C. The decision conflicts squarely with an earlier decision by the United States Court of Appeals for the Second Circuit in this same case and also conflicts in principle with other decisions of that same Court.

As discussed *supra,* the first decision of the U. S. Court of Appeals was on Shipowner's appeal from the first adverse jury determination, and the U. S. Court of Appeals

there held that the indemnity issue presented issues of fact on which it ordered a retrial, 346 F.2d 481. Lo and behold, following the retrial of that same issue, which again resulted in a jury verdict in favor of the Stevedore, a divided U. S. Court of Appeals (with the same Circuit Judge writing the majority opinion) now declares that the issues are not factual and substitutes its own judgment for that of the jury and awards the shipowner indemnity. As stated in the dissenting opinion of Circuit Judge Moore:

> "The entry of judgment notwithstanding the verdict (*and the overruling of this court's prior determination that there was a triable issue on essentially the same facts as are before us now*) is in my opinion an unjustified usurpation of the function of the jury". (Emphasis added)

In *McNamara* v. *Weichsel Dampschiffahrts ag Kiel, Germany,* 293 F.2d 900, 904, the United States Court of Appeals for the Second Circuit stated:

> "Here there were at least two important *fact questions.* Was there substandard performance of its stevedoring contract by Pittston? Was there conduct by Weichsel sufficient to bar recovery?" (Emphasis added)

How capricious for this same U. S. Court of Appeals to now classify the *identical* questions as issues of law or to determine them as issues of law.

Are all decisions out of step except the one which is sought to be reviewed. If that be the case and the conflicting decisions of this Court, of other Circuit Courts, and of the Second Circuit itself, are in error, then this Court should grant certiorari so as to accomplish the needed change in the law and lay down the guidelines for Courts which look to this Court for instruction and guidance. If,

on the other hand, the decision, sought to be reviewed, errs in its conflict with all the other aforesaid decisions, then certiorari should be granted so that such conflict can be terminated immediately.

III.

Resolution of the questions, presented herein, is of paramount importance not only so that there may be uniformity in the administration of Maritime Law, but for the survival of the stevedoring industry in other than a monopolistic form.

The rights of parties under Maritime Law are not dependent upon the courthouse in which the action is instituted. *Pope & Talbot* v. *Hawn,* 346 U.S. 406, 74 S.Ct. 202. The dispensation of equal justice under Maritime Law requires that the administration of that law be uniform throughout the country. The correlative rights and obligations of a Shipowner and a Stevedore in the Ninth Circuit should be the same as those of a Shipowner and a Stevedore located within the geographical confines of the Second Circuit. Thus, the resolution of the conflict above outlined between the Second Circuit and the various other Circuits, which have considered the issues here involved, is a matter of particular importance in the maritime field where nationwide uniformity is so much to be desired.

It must be further appreciated that when the decision under consideration is translated into practical, every day, waterfront meaning, it in effect says to the stevedoring industry: Even when you do your work exactly as your customer, the shipowner, directs, you must nonetheless indemnify that shipowner for any accident which results in obeying his orders. This is, of course, tantamount to say-

ing to the stevedoring industry that it is an insurer of the shipowner for accidents occurring aboard ship.

As this Court will readily appreciate from the very nature of the business, stevedoring contractors are basically purveyors of labor. Few, if any, possess the wealth and assets which can withstand the legal assaults such as that made by the Court below. Manifestly, protection against such ever widening and expanding liability must be sought from the insurance industry. Yet, it is axiomatic that as the potential liability increases, the premium charge for the same also increases. Indeed, the insurance premium charge to one Stevedoring company for the basic protection of longshoremen's compensation claims and shipowner's actions for indemnity is now reputed to equal 45 to 50% of the payroll of that company.

The end result of this spiraling process of ever increasing the legal liability of the stevedores, thereby compelling it to obtain insurance at ever increasing rates, has been to drive the majority of those companies out of business and to leave surviving only those few who possess an infallible degree of expertise, or a willingness, backed by sufficient wealth, to become an insurer.

Within the past few years in the Port of New York alone, many venerable stevedoring firms have gone out of business, including—

American Stevedores Inc.
Turner and Blanchard, Inc.
Maude James Inc.
T. Hogan & Sons
John T. Clark & Son
Atlantic Stevedoring Co.
Commercial Stevedoring Company

Nessa Corp. and
Jules Sottnek Co. Inc.,

and this is only a partial list.

Such a development in the leading Maritime Port of New York demonstrates the plight of the stevedoring industry, responsive to the death knell tocsin of the judiciary. The pendulum has been pushed too far and a healthy, independent, competitive stevedoring industry cannot survive in a legal climate made up of decisions such as the one under review.

The death of the stevedoring industry must ultimately adversely affect the entire shipping industry and the nation as a whole. Without independent stevedoring firms who stand by with a ready supply of longshoremen to load or discharge vessels which may arrive at any time of the day, how are shipowners going to have their vessels loaded or unloaded? A general decline of the stevedoring and shipping industries will cause untold harm to those seaboard and Gulf States which have been for so long so heavily dependent upon maritime commerce.

Undoubtedly, many petitions for certiorari paint dire pictures of what will occur if certiorari does not issue and the error corrected. In this case, however, the dire picture is supported by the general decline of shipping in the Port of New York and the decline in that port of a stevedoring industry to the point where only four or five independent stevedoring contractors now exist where more than thrice that number had flourished.

CONCLUSION

The issues, involved here, are of national importanc
the stevedoring and shipping industry. The decision of
U.S. Court of Appeals is a major departure from the
ings of this Court and is similarly in direct conflict
the decisions of each of the other U.S. Courts of App
which have resolved the same issues.

The decision under attack constitutes a sharp ero
of the Constitutional mandate that "no fact tried b
jury, shall be otherwise reexamined in any Court of
United States, than according to the rules of common l
Further invasion of constitutionally protected rights
follow unless this decision is reversed.

Surely a decision which presents such a danger to
vital industries of this country and which at the same
is in conflict with decisions of this Court and decis
of all other Circuit Courts which have previously de
mined the same issues, and which at the same time viol
constitutionally protected rights, is a decision which sh
be reviewed by this Court.

Respectfully submitted,

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Of Counsel

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